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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 70

BOSTON METALS COMPANY, FORMERLY NAMED BOSTON IRON AND METAL COMPANY, AS OWNER OF THE CANADIAN DESTROYER "ST. FRANCIS",

Petitioner,

VS.

S/S "WINDING GULF"

AND

MASSACHUSETTS TRUSTEES OF EASTERN GAS AND FUEL ASSOCIATES,

Respondents.

ON CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITIONER'S REPLY BRIEF

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I. QUESTION PRESENTED

The "Question Presented" as restated by respondents[1] is unacceptable to petitioner in two respects:

[1] Respondents' brief, pages 5 and 6. Petitioner is satisfied that the opinions below do not support respondents' analysis (at pages 2-5 of their brief) of the reasoning of the district court or of the court of appeals, which analysis culminates in respondents' restatement of the "Question Presented."

First, in that it omits the indisputable fact that at the time of collision the destroyer was under the exclusive direction and control of the tug PETER MORAN and her master and crew; and

Secondly, in that it adds to the "Question" language not justifiable by anything in the record; viz, that "the owner of the tow . . . arranged for the towage with the knowledge that the tower will not light or man the tow and . . . himself has made no provision that those things be done . . ."

II. STATEMENT OF THE CASE

Under "Statement of the Case", respondents say that "Petitioner knew as a fact that they (the master and crew of the tug) would not man the tow or see that her lights were adequate," and that ". . . control of them (the lights) remained with petitioners."[2] This is a gratuitous assumption not acceptable to petitioner for reasons which will be fully developed under Point IV hereof entitled "Argument." (infra p. 4.)

III. SUMMARY OF ARGUMENT

Petitioner also takes issue with respondents' conclusion, under "Summary of Argument", that "The contract shows unequivocally that the area in which the tower was to act did not include responsibility for the lighting and manning of the tow."[3] Under Point IV hereof, "Argument", (infra p. 4) it is shown that this conclusion is unsupported by the record.

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[2] Respondents' brief, page 6.
[3] Respondents' brief, page 7.

IV. ARGUMENT

A. Reply to Respondents' point A as to "The True Significance of The Contract and the Correct Basis For Petitioner's Liability to Respondents."[4]

Respondents' entire argument under Point A seems to depend on an interpretation of the contract which would deny the existence of exclusive direction and control in the towing company and impute knowledge to petitioner that the towing company would not man or light the tow.

There certainly is no real issue here as to direction and control, whatever the arrangements between the parties may have been or the contract may have provided. It cannot in good faith be contended that petitioner, in fact, had anything to do with the navigation of this destroyer at the time of collision. There was no representative of the owner on board. The existence of *the fact* of exclusive direction and control in the towing company as an independent contractor must be conceded. It is, therefore, doubted that any contract or arrangement (or knowledge thereof by the owner of the tow) could effectively shift the obligation imposed by law on the towing company as an independent contractor to light the tow or man it where necessary in the judgment of the tugmaster, so as to form the basis for direct recovery by a third-party against the owner of the tow. Under the circumstances here, the tug alone was legally responsible for the navigation of the tow, specifically including responsibility for placing lights necessary for its safety and the safety of other vessels,[5] and where collision results from navigational fault neither the tow nor its owner can be held liable.[6]

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[4] Respondents' brief, pages 8-12.
[5] *Lizzie M. Walker — Virginia* (4th Cir. 1925) 3 F. Supp. 921.
[6] *Sturgis v. Boyer*, 24 How. (65 U.S.) 110.

The "knowledge" that the towing company would not light or man the tow is gratuitously imputed to petitioner throughout Respondents' brief,[7] in the apparent hope that frequent repetition and emphasis will compensate for lack of substance. No inference can fairly be drawn from the record here (which includes the entire contract and all of the testimony as to the manner of performance of the towage), that the towing company was not going to light or man the tow, much less that petitioner had any basis for "knowing" that this would not be done.

The tower's letter to petitioner confirms an agreement on its part as an independent contractor to "supply tug *for the towage*" of petitioner's destroyers,[8] which necessarily carries with it the obligations imposed by law respecting proper navigation of the tow. Further, in conjunction with requiring that all watertight doors be closed and rudders secured amidships, the tower, in its letter, expressly undertook to "supply the necessary personnel for handling the vessels "at such times in the course of the voyage as it anticipated personnel aboard the destroyers might be needed.[9]

The function of the Standard Towing Conditions was merely to fix the circumstances under which, as between tug and tow, the *ultimate* impact of any loss or damage in the course of the towage would fall, and to specify the limits within which indemnity would be recoverable by the tug against the tow. They do not and were not intended to touch upon responsibility for lighting and manning the tow.[10]

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[7] Respondents' brief, pages 6, 7, 8, 9 and 10.

[8] Record, pages 21 and 22.

[9] Record, page 22.

[10] Record pages 23 and 24. The provision in subpar. 2, to the effect that the tug company only undertakes to provide motive power, when read in proper context, clearly is intended to do nothing more than explain and clarify the circumstances under which the tow was to assume the risk of *its own* loss or damage, and to lay a basis for the stipulation that, *as to loss or damage to the tow only*, the master and crew of the tug are the

But even if the contract had specifically purported to place responsibility for lighting and manning the tow upon petitioner, the conduct of the masters and crews of both tugs in the performance of the towage leaves no room for speculation as to the parties' understanding of where these obligations rested, as between tug and tow. Both tugs brought lights with them to be set in place on the tows, and, without hesitation or inquiry, their masters took the necessary steps to do so.[11] The PETER MORAN, which had the destroyers in tow at the time of collision, carried a crew of 15, only two of whom were then on watch on the tug.[12] Can it reasonably be doubted that with a crew of this size the tower had sufficient manpower available for handling and manning the tow at such times in the course of the voyage as would be necessary or advisable in the judgment of the master?

There is thus no basis, either in fact or law, for application of the rule contended for by respondents that the contract delineates areas of responsibility in such a way as to render petitioner personally liable directly to them. Nothing has been shown which would make inapplicable the authorities discussed in petitioner's brief, pages 14 to 23, which are to the effect that the party responsible in each instance is the one in actual control of the navigation of the flotilla at the time the damage occurs, and there can be no direct recovery against the owner of the tow unless the

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servants of the owner of the tow. Indeed, the Standard Towing Conditions, as well as the tower's letter, specifically contemplated that the tug's crew *would* be aboard the destroyers during the course of the voyage. (See subpar. 4, Record page 23.)

[11] Record, pages 33, 37 and 39. As it is undisputed that the tug *in fact* set in place the lights which were found inadequate, how could petitioner have "known" that the tower would not light the tow?

[12] Record, page 5.

responsible individual is, in fact, his agent. The rule contended for by respondents is clearly out of place in a towage situation. Divided responsibility in this area is especially repugnant. The unfitness of the rule is well illustrated by the implication of respondents' argument on pages 10 and 11 of their brief that petitioner should be held personally liable because the tow line used by the tugmaster "was of unusual length." Respondents' quote from that portion of Judge Chesnut's opinion which suggests that the "unusual" length of the tow line, imposes an obligation to station riders on the tow, which otherwise might not exist.[13] From this reasoning, it can be inferred that petitioner could have avoided personal liability, if it had prescribed in advance the length of the tow lines to be used. Patently, no rule of law should require the imposition of conditions and restrictions (often by unqualified persons) which would hamper the free exercise of the judgment of the tugmaster in the performance of his duties. Conversely, it is certain that the tugmaster knew at the time he took charge of this tow that nobody else was going to light or man it (whether or not he also knew that someone else was supposed to do this). Respondents would have this court approve a principle which, if carried to its logical conclusion, would condone the conduct of the tugmaster in taking out the tow unlighted, leaving owners of vessels which might be damaged as a result, without recourse against either the tug or the towing company.

B. Reply to Point C of Respondents' Brief

It is contended under Point C of respondents' brief that, even though petitioner be deemed not subject to liability

[13] Record, pages 10, 11.

in personam, it cannot have affirmative relief because the destroyer would have been liable *in rem* had it survived.[14]

Without for a moment conceding that *in rem* liability, if it existed, could bar affirmative recovery, the fact is that the destroyer did not survive, and the court had no *in rem* jurisdiction. And even if it had, there could have been no *in rem* liability under the circumstances of this case. Respondents' argument overlooks the fundamental and well-established distinction between pilotage and towage cases, expressed by Professor Robinson as follows:

> "Giving the ship into the care of a person who operates her from on board risks the ship. But in the towage cases, the ship owner who entrusts his vessel to a tug does not risk her. *She is not subject to maritime lien even if she be the actual instrument of injury.*" (Emphasis supplied.)[15]

In *Sturgis v. Boyer*[16] the tow was the instrument of injury and it survived, but the libel *in rem* was dismissed. Commenting on that case, Mr. Griffin says:

> "Even the fact that though part of the ship's crew was aboard, they kept no lookout, did not render her liable, because the tug alone was in charge of the operation."[17]

The Fourth Circuit, in what has been described as "a series of notable decisions . . . (f)ollowing the general theory of liability of a tug with tow to third parties for misnavigation settled by *Sturgis v. Boyer* . . ."[18] has held

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[14] Respondents' brief, pages 16-19.

[15] Robinson on Admiralty, page 680, adding, at page 681, that "In the absence of *respondeat superior* liability, the tow was not subjected to liens."

[16] 24 How. (65 U.S.) 110.

[17] Griffin on Collision, page 414.

[18] Clark, Ct. J. dissenting in *Logue Stevedoring Co. v. Tugs Dalzellance, etc.* (CA 2, 1952) 198 F. 2d 369.

the tug and specifically exonerated the tow *in rem* in varying circumstances, in all of which the tow was the offending *res*.[19]

V. CONCLUSION

Respondents have shown no valid reason why the decision of the court of appeals should not be reversed and the cause remanded to the district court with instructions to dismiss the cross-libel and enter an affirmative decree for petitioner for the amount of its damages as found by the district court, and, for the reasons heretofore set forth in petitioner's brief, it is herewith respectfully requested that this be done.

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EUGENE M. FEINBLATT,
Proctors for Petitioner.

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[19] *The Dorset*, 260 Fed. 32; *The John D. Rockefeller*, 272 Fed. 67, cert. den. 256 U.S. 693; (fault with respect to sounding of whistle signals by tow) *Calzavaro v. Planet 88 Corp.*, 31 F. 2d 885; See also *Lizzie M. Walker — Virginia* (4th Cir. 1925), 3 F. Supp. 921 (inadequacy of lights on tow); *Ora Ellis-Primavera* (CA 2, 1952), 197 F. 2d 607 (failure to have lookout on tow); *Naamlooze Vennootschap, etc. v. Moran Towing & Transp. Co.* (2 Cir. 1925), 9 F. 2d 614.